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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NORTH RIVER INSURANCE COMPANY, et al., Defendants and Appellants.	G046546 (Super. Ct. No. 05NF2029) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Jefferson T. Stamp for Defendants and Appellants.

Nicholas S. Chrisos, County Counsel, and Marisa Matsumura, Deputy County Counsel, for Plaintiff and Respondent.

* * *

I. INTRODUCTION

The surety in this bail bond case appeals from a postjudgment order denying its motion to set aside a summary judgment for the $50,000 amount of the bail bond plus interest. The set aside motion could only have succeeded if the earlier summary judgment were void. The argument that the summary judgment is void is based on the district attorney's office's failure, on October 29, 2009, to *sua sponte* notify the surety the office had, as reflected in a document in the office's file dated that day, elected "against exercising its right" to extradite the defendant "at this time." (Capitalization and bold omitted.)

The surety's theory is that if it had been notified, it could have brought a motion under Penal Code section 1305, subdivision (g), to have the previous forfeiture of bail vacated and the bond exonerated; the district attorney's office's omission of notification of its decision of October 29, however, effectively deprived the surety of that opportunity. According to the surety, the omission amounts to nothing less than a deprivation of due process, rendering the eventual summary judgment void. (All further statutory references are to the Penal Code.)

The surety's argument is unavailing because the record does not establish that the district attorney's office elected not to seek extradition within the meaning of the statute on October 29, 2009. All that happened that day is that one prosecutor simply made a *tentative and uncommunicated* choice not to pursue extradition, a choice that was clearly reversed by a firm and communicated decision *to* seek extradition less than three weeks later. Accordingly, the judgment was not void under section 1305, subdivision (g).

And because the judgment was not void, res judicata precludes the relitigation of issues which could have been raised, but weren't, in a prior proceeding. In this case the prior proceeding was a prior appeal. (See *People v. Fairmont Specialty Group* (July 6, 2011, G044077) [unpub. opn] (the first appeal).) The issue of the October

29 decision could have been raised in that appeal, but wasn't. Accordingly, we affirm the order denying the set aside motion.

II. FACTS

Vicente Amaya was involved in a hit and run accident in August 2004. He was arrested. He pled not guilty on October 22, 2008. The next day he obtained a $50,000 bail bond from Bad Boys Bail Bonds, which was a bail agent for the North River Insurance Company (North River).

North River is one of the Crum & Foster group of insurance companies. Within the Crum & Foster group, North River underwrites insurance policies of the Fairmont Specialty Company (Fairmont). This layered and somewhat convoluted structure involving Fairmont and North River sheds some light on why all subsequent bail bond proceedings leading up to the first appeal were brought under the name of Fairmont, by lawyers listing Fairmont as their client, even though the actual insurer named on the bail bond was North River. It was only after the first appeal that the bail surety started referring to itself as North River. The record before us furnishes no explanation for the sudden transformation from Fairmont to North River.

Amaya did not show up for a court hearing on December 4, 2008, and the bail bond was forfeited. The superior court sent Fairmont a notice of forfeiture of the bond on December 5, 2008.

As we explained in our unpublished opinion in the first appeal, a surety has 180 days after forfeiture (plus another five for mailing of the clerk's notice) to bring a defendant back to court or, if there's good cause, obtain an extension limited to another 180 days. (*People v. Fairmont Specialty Group, supra*, G044077, at p. 2.) But, as this court's published opinion in *People v. Seneca Ins. Co.* (2010) 189 Cal.App.4th 1075, 1082 makes clear, that additional 180 days is the limit. A surety only receives a "one-time extension" of the initial 180 days. (*Ibid.*)

Fairmont received its one-time 180-day extension in June 2009, via a stipulation between it and Orange County Counsel. County counsel represented both the People and the County of Orange.

By sometime in July 2009, Amaya had been located in Maria del Oro, Durango, Mexico. On July 29, 2009, Susan Gilbert, corporate counsel for Bad Boys Bail Bonds, sent Susan Laird, the deputy district attorney then handling the case, a letter by Federal Express informing Laird of Amaya's location. Gilbert also requested "a determination" from the district attorney's office "regarding extradition on this case." At the bottom of her letter, after the close of Gilbert's text and at the bottom of the page, Gilbert included a proposed form to be filled in by a deputy district attorney in which the district attorney's office would declare that it had "decided to exercise/against exercising its right to extradite" Amaya. (Capitalization and bold omitted.) Underneath was provided several lines for a deputy's signature, printed name, title/division, date, and contact number.

Neither Laird, nor the deputy district attorney who succeeded her, Ray Armstrong, ever replied to Gilbert's letter. However, almost exactly three months later on October 29, 2009, Armstrong filled out the lines at the bottom of the letter, including giving his phone number. He struck out the words "to exercise," leaving the words "against exercising" intact, but, at the end of the sentence added the handwritten words "at this time." For some reason, not revealed in the record, no one in the district attorney's office ever sent back the letter or sent back a copy of the letter with the material at the bottom filled out.

The one-time 180-day extension was drawing to a close in December 2009. On December 1, Fairmont filed a motion to "toll" the period, supported by the fact that Amaya had not only been located in Mexico, but had also, in September 2009, been brought before a Mexican police officer and had been temporarily held in that officer's presence. Fairmont's motion was supported by Gilbert's declaration that on "November

16, 2009," she "received a voicemail from Mr. Armstrong indicating that extradition would be pursued of Mr. Amaya from his location in Mexico." While there was opposition from the county counsel's office arguing no tolling was possible under the circumstances, the trial court perfunctorily (at least as shown by the abbreviated transcript found in the record now before us) granted a 180-day extension, to expire June 11, 2010.

Not much happened in the extra 180 days Fairmont obtained in December 2009. The next event was a motion, filed June 10, 2010, to vacate forfeiture and exonerate bail or, alternatively, toll time. That motion would become the focus of the first appeal.

The main point of Fairmont's motion was that it should not, as we characterized it in the first appeal, "be penalized for the time the district attorney's office took in making up its mind whether to extradite a fugitive." (*People v. Fairmont Specialty Group*, *supra*, G044077, at p. 5.) We noted that county counsel's points and authorities in opposition plainly stated the district attorney's office had indeed decided to extradite the defendant from Mexico, albeit county counsel provided no actual evidence to that effect. In retrospect, it is obvious Fairmont had not obtained, by the time of its June 10, 2010 motion, a copy of the form Armstrong had filled out on October 29, 2009 indicating an election not to extradite at least as of that "time."

Fairmont's June 2010 motion was denied in a minute order dated July 8, 2010. Summary judgment was now inevitable. Within six days, on July 16, 2010, the trial court signed a summary judgment on the bail bond, providing the County of Orange was to recover the $50,000, plus interest.

Fairmont filed a notice of appeal from the "order of June 8 [*sic*: July 8 was clearly intended] 2010," denying Fairmont's "motion to vacate forfeiture and exonerate bail." The appeal resulted in this court's decision in the first appeal affirming the order, denying Fairmont's June motion. We decided two points of law. The first was to reject

Fairmont's argument that section 1305, subdivision (g), should be read to *require* vacation of forfeiture of a bail bond when a prosecutor "*does* elect to seek extradition." (*People v. Fairmont Specialty Group, supra*, G04077, at p. 6.) The second was to reject Fairmont's plea to read some form of equitable tolling *into* California's statutory scheme governing bail bond forfeitures. We characterized Fairmont's argument in the first appeal: "It is simply unfair for the prosecutor to delay making a decision on extradition and, in effect, run out the clock on any possibility of bond exoneration." (*Id*. at p. 7.) We rejected that argument as "better made to the Legislature" than to this court.

Our decision, filed July 6, 2011, apparently galvanized Fairmont into new action. Within about five weeks, in mid-August 2011, Fairmont – now litigating under the rubric of the North River – filed a motion to set aside the summary judgment, vacate the forfeiture, and exonerate the bond based on "extrinsic fraud or mistake and lack of due process." (Capitalization and bold omitted.) North River, however, has not included a complete copy of this mid-August 2010 motion in the record before us now. The record only contains a copy of an amended motion filed November 7, 2011. The hearing on the motion was eventually scheduled for December 1, 2011.

Armstrong's October 29, 2009 writing on the July 29 letter from Gilbert was *not* part of the November 7, 2011 amended motion to set aside the summary judgment. Rather, the whole point of North River's motion was that its due process rights had somehow been impaired by Orange County's practice of having the county counsel's office represent the district attorney's office (i.e., the People) in bail bond matters. North River's theory was county counsel's involvement prevents the district attorney's office from making "impartial" decisions on extradition. That issue, however, is *not* raised in this appeal.

The issue that *is* raised in this appeal concerns Armstrong's October 29, 2009 filling out the form he was sent in July 2009. The story behind the raising of the issue is this: On November 15, 2011, North River's counsel had a subpoena issued to

Armstrong, requesting all documents related to the extradition of Amaya as well as relating to any decision as to whether to extradite Amaya. County counsel objected to the subpoena, and a hearing was held on the objection on December 1, 2011, the same day set for the hearing on the main motion to set aside the summary judgment. The result was an order overruling county counsel's objection, plus an order continuing the motion to set aside to January 5, 2012. The order resulted in the discovery of Armstrong's October 29, 2009 filling out the form on Gilbert's July 2009 letter. A reporter's transcript of that hearing has not been provided this court on appeal, so we cannot say anything more about the arguments made at that hearing.

The January 5, 2012 hearing was continued about a week to January 13. In the interim, on January 10, 2012, North River filed supplemental points and authorities, which, for the first time, proffered the argument that the district attorney's office had, as revealed by Armstrong's filling out the form on the July 2009 letter from Gilbert on October 29, 2009, elected *not* to extradite Amaya (and hence section 1305, subdivision (g) was triggered). Specifically, North River argued due process "demands" a district attorney's office "provide notice any time an extradition decision is made that affects a pending bond forfeiture."

Even though raised in supplemental papers and not in the original motion, the trial court considered the merits of the new argument. It was still unavailing. The trial court reasoned there was no violation of due process, and alluded to Gilbert's statement she had been informed by the district attorney's office on November 16, 2009 that it was seeking extradition. The trial court ruled the summary judgment was not void, and, not being void, the issues "pertaining" to the bond forfeiture had been adjudicated in the first appeal. The motion to set aside the summary judgment was thus denied in a minute order dated January 13, 2012. About a month later North River filed this appeal from the order of January 13, 2012.

DISCUSSION

1. Appealability

Procedurally, California's bail bond forfeiture scheme works by a basic three-step process: First, there is a forfeiture when the accused fails to appear without sufficient excuse. Second, there is an appearance period during which the surety can produce the accused in court and have the forfeiture vacated. And third, if the forfeiture is not set aside by the end of the appearance period, summary judgment is required. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657.) In this scheme, there thus comes a point when an order refusing to extend the appearance period or otherwise vacate the forfeiture will make summary judgment inevitable. (See *id*. at p. 658 ["After the appearance period expires, the trial court has 90 days to enter summary judgment on the bond."].)

An order denying an extension of the appearance period and otherwise refusing to vacate the forfeiture is analogous to an order granting an ordinary civil summary judgment motion. The order makes a formal judgment inevitable (or virtually inevitable), but *itself* is not an appealable final judgment. Strictly speaking, an appeal challenging the substance of a trial court's decision not to extend the appearance period or otherwise vacate forfeiture should be properly taken from the summary judgment that is required to follow the trial court's decision not to extend or vacate, not from the order that merely reflects that decision. (See *People v. Seneca Ins. Co.* (2004) 116 Cal.App.4th 75, 79-80 ["Seneca's notice of appeal purports to appeal from the trial court's order denying its motion to extend the 185-day period under section 1305.4. That order, however, is not appealable."].)

In the case of bail bonds, since the formal summary judgment often follows quickly on the heels of the motion denying extension and refusing to vacate, judicial economy is facilitated by the appellate court simply augmenting the record on its own motion to include the formal summary judgment, and deeming the appeal to be from the

formal summary judgment. (See *People v. American Surety Ins. Co.* (1999) 75 Cal.App.4th 719, 722.) In retrospect, then, in the first appeal we should have augmented the record to include the summary judgment of July 16, 2009, and made explicit what was necessarily implicit, namely that the appeal was taken from the July 16 formal summary judgment. (See Cal. Rules of Court, rule 8.104(d)(2) ["The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment"].)

This second appeal before us presents no such appealability problem. Since the motion to set aside the summary judgment embraced matter under consideration in the first appeal, the trial court could not have entertained any proceeding on it until the first appeal was final. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 197 ["Under section 916, 'the trial court is divested of' subject matter jurisdiction over any matter embraced in or affected by the appeal during the pendency of that appeal."].) After the first appeal was final, North River promptly brought a motion to set aside that summary judgment. When the motion was denied, North River quickly appealed from an appealable post-judgment order.

2. Legal Background

The topic of forfeiture of a bail bond is covered in section 1305. Subdivisions (f) and (g) govern the issue of extradition. Subdivision (f) does not apply to this case, because subdivision (f) only covers cases where a defendant is already in custody beyond the jurisdiction of the California court, and there is no evidence in this record Amaya was ever "in custody" in Mexico.

The record does show, however, that Amaya was located there, brought before a Mexican police officer, and temporarily held in the officer's presence. That situation is directly governed by section 1305, subdivision (g), which we now quote in

full: "(g) In all cases of forfeiture where a defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, and is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court shall vacate the forfeiture and exonerate the bond on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release."

Section 1305, subdivision (g), is structured in the form of a series of conditions which trigger a legal result. Thus, if the defendant has fled the state and is not in custody in some other jurisdiction, and he or she is (1) temporarily detained by the bail agent in the presence of an officer of the jurisdiction, (2) positively identified by that officer as the wanted defendant in a signed, sworn affidavit, and (3) the California prosecutor "elects not seek extradition after being informed of the location of the defendant," then there is a mandatory legal result: The previous forfeiture "shall" be vacated and the bond exonerated, albeit the court has discretion to do so on "terms that are just" and with certain parameters not relevant to this appeal.

Two aspects of section 1305, subdivision (g)'s recent history should be noted before we address North River's argument the summary judgment was void. First, the interaction between extradition efforts and the opportunity to vacate the forfeiture afforded bail sureties in subdivision (g) has been an issue of some concern to the bail surety industry generally for the past several years. In 2008 the Legislature passed Assembly Bill No. 1133 (AB 1133) which would have amended subdivision (g) to *require* prosecutors, within 60 days of receiving the affidavit from the officer of the foreign jurisdiction, "to elect" to seek extradition if extradition were feasible, though the amendment did not say what would happen if the prosecutor failed to make such an election within the 60 day period.

Second, AB 1133 would have added a new subdivision (h) in the place of the existing one to allow the court to toll the "180-day period during the time the prosecuting attorney is seeking extradition for an additional time up to another 180 days if the extra time was necessary to achieve extradition."

AB 1133, however, was vetoed by Governor Schwarzenegger on September 26, 2008. His veto message did not mention any defects in the legislation, only that the delay in passing that years's budget had forced him to into "only signing bills that are of the highest priority for California." (Governor's veto message to Assem. Bill No. 1133 (Sept. 26, 2008) 6 Assem.J. 2007-2008 Reg. Sess., p. 7336.)

The second aspect of subdivision (g)'s recent history is that bail sureties have been attempting, in the courts, to obtain some sort of equitable tolling to allow for the time prosecutors take to decide whether or not to extradite. They have not succeeded. Indeed, the first appeal in this case represented one such effort. We noted that both that case and our court's recent decision in *Seneca* amounted to efforts to "punch equitable holes into a statutory scheme that simply will not allow for them." (*People v. Fairmont Specialty Group, supra*, G044077, p. 8.) And recently, *People v. Western Ins. Co.* (2012) 204 Cal.App.4th 1025 also turned back an effort to find some sort of equitable tolling in the bail bond forfeiture scheme, concluding that "tolling the appearance period during the extradition process is inconsistent with the statutory scheme." (*Id*. at p. 1032.)

We should add, for sake of completeness, that section 1305 was amended just this year as it relates to the subject of extradition in legislation that *was* signed by the Governor. (See Stats. 2012, ch. 129.) The new legislation adds a new subdivision (h), which allows for extra time if subdivision (g) already applies and the bail surety and prosecutor agree to the extra time, plus it adds a new subdivision (k) requiring bail sureties to give prosecutors 10 days notice if they bring any motions under subdivisions (f), (g) or new subdivision (h).

3. Due Process and Voidness

North River's position in this appeal is that the inaction of the district attorney's office in not notifying it of the October 29, 2009 decision "against exercising" its right to extradite Amaya "at [that] time" deprived it of necessary "notice," which was a jurisdictional defect rendering the eventual summary judgment void. Since that judgment was void, the logic goes, res judicata would not apply.

Preliminarily, let us note that, regardless of the merits of North River's argument, this record affirmatively shows there was *no* bad faith on the part of the district attorney's office. First, Armstrong filled in the blank lines giving his contact number, which is evidence that he intended to make himself available to the bail surety's counsel for quick updates on the status of any extradition of Amaya. On top of that, the format of Gilbert's letter did not facilitate an easy reply. Gilbert supplied a form to be filled out at the bottom of her own letter, which would have meant the letter, with one of the two alternatives at the bottom interlineated out, would have had to have been copied, then sent to Gilbert. That minor clerical task could easily have been lost or forgotten in the shuffle.

Secondly, and dispositively, this record gives rise to the reasonable inference that Armstrong did not "elect" not to extradite within the meaning of section 1305, subdivision (g). As our Supreme Court stated in *American Contractors Indemnity*, *supra*, 33 Cal.4th at pages 657-658, bail bond proceedings are civil in nature, based on the bail bond itself being a *contract* between the bail surety and the government. In this regard, the structure of section 1305, subdivision (g) clearly contemplates some *communication* of any election by a prosecuting agency "not to seek extradition" after the bail surety informs that agency has been located in a foreign jurisdiction and has been subjected to the other requisites of the statute (i.e., temporarily detained and positively identified). The statute is written in such a way as to assume the bail surety will make a presentation to the court triggering the vacation of the previous forfeiture, which implies

the prosecuting agency bail bond will *communicate* its election "not to seek extradition" to the bail bond surety. And of course by the same token it is elementary contract law that to have a contract the consent of the parties must be "[c]ommunicated by each to the other." (Civ. Code, § 1565.)

Here, not only was Armstrong's marking of the form not communicated to North River, but the very form of the thought – "at this time" – conveyed hesitancy, not election. In marking Gilbert's letter and not sending it, Armstrong was doing nothing more than talking to himself.

By contrast, what *was* communicated to North River was communicated less than three weeks later and was unequivocal. Obviously a hesitant, tentative uncommunicated choice not to pursue extradition had hardened into a firm election *to* extradite Amaya. Under such circumstances, then, we cannot say section 1305, subdivision (g) was triggered by Armstrong's interlineations of October 29, 2009. Accordingly, we cannot say there was any basis to hold the later summary judgment void.

4. Res Judicata

The summary judgment not being void, res judicata bars the relitigation of issues which could have been raised in the proceeding leading to it, but weren't. (See *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557 ["res judicata not only precludes the relitigation of issues that were actually litigated, but also precludes the litigation of issues that could have been litigated in the prior proceeding."].)

In this case, Fairmont – well before its more recent incarnation in this litigation as North River – never took advantage of the opportunities it had to inquire about the status of Amaya's extradition. It did nothing to follow up on its July 2009 letter until after it received our opinion in the first appeal. It could have subpoenaed Armstrong's October 29, 2009 writings on Gilbert's July 2009 letter prior to the

December 1, 2009 hearing on its motion to toll. The issue was not raised in the first appeal, so the matter became final with the decision in the first appeal.

DISPOSITION

The postjudgment order denying the motion to set aside the summary judgment is affirmed. Respondent County of Orange shall recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.